

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	
)	
Closed Captioning and Video Description)	
of Video Programming)	MM Docket No. 95-176
)	
Implementation of Section 305 of the)	
Telecommunications Act of 1996)	
)	
Video Programming Availability)	

REPLY COMMENTS OF ENCORE MEDIA CORPORATION

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Summary

Encore Media Corporation (“EMC”) is one of the largest providers of programming networks to cable, DBS, wireless cable, TVRO, and SMATV operators. The channels EMC distributes, including STARZ!-encore 8 and ENCORE, consist primarily of feature films, with the exception of EMC’s noncommercial children’s-oriented channel, WAM!America’s Kidz Network, which features a variety of entertainment and instructional programming directed primarily toward children ages 8-16. EMC has generally supported the Commission’s proposal to require closed captioning of programming first exhibited after the effective date of the new captioning rules over a ten year period, phased in as set out in the Notice of Proposed Rulemaking.

In these Reply Comments, EMC explains that the counterproposals, set forth by groups representing the hearing impaired, to speed up the required captioning of newly-produced programming to a three to four year deadline are unreasonable, and fail to take into account the statutory directive that the need for captioning be balanced against the costs and burdens of implementing such obligations. EMC also submits that at the end of the phase-in period, whether eight or ten years, the new rules should allow for a “substantial compliance” level a few percentage points below 100% captioning, to allow for exigencies without requiring the Commission to rule on numerous waivers or exceptions.

EMC also opposes a more stringent requirement than was proposed in the NPRM for captioning of older, “library” programming that was produced before the effective date of the rules, as suggested by the groups representing the hearing impaired. Such library programming should not be required to be captioned by a tight deadline as proposed by these groups, nor

should any obligation to caption be phased in in stages as is appropriate for newly produced programming. The structure of the programming marketplace is such that older films and other programming are typically licensed in long term contracts that will not expire for several years, and thus demanding that suppliers caption already-licensed films or provide captioning rights that were not included in the original licenses is not realistic.

EMC further submits that the Commission should adopt exemptions from required captioning for two types of programs: (i) short-form promotional programming or interstitials; and (ii) instructional educational programming for children. In the case of interstitials, the Commission has properly recognized that these promotional and scheduling announcements should be exempt from the captioning requirements for the reasons that interstitials have little or no lasting value, that such interstitials often provide the basic information in textual form, and that large numbers of such segments must be produced in short time periods. EMC urges the Commission to exempt all interstitials, including but not limited to scheduling announcements, program introductions, and short-form promotional segments. In addition, EMC suggests that the Commission not attempt to define too narrowly the types of interstitials that should be included in this exemption. Should the Commission view a blanket exemption of interstitials as too open-ended, it would be preferable to adopt in the alternative a simple, time-based rule exempting all such short-form programs of fifteen minutes duration or less. Such a bright-line rule would eliminate any significant demand on the Commission's staff to evaluate or rule on specific interstitials for compliance with the rules or for individual waivers or exemptions. With respect to instructional educational programming, EMC has shown that many programmers present such programming as a public service with no financial gain, and

that the economics of such programming do not allow for routine captioning. EMC submits that imposition of captioning requirements would directly result in less such programming being aired.

Finally, EMC demonstrates herein that the view propounded by both the Commission and the groups representing the hearing impaired that the “existing contracts” exemption set forth in the statute should encompass only those contracts which expressly prohibit captioning is far too narrow, and fails to take into account the nature and legalities of film and program licensing. Program networks are generally granted only very narrow exhibition rights to the films or programs they obtain through licenses from copyright owners and/or distributors, and those license agreements often prohibit the licensees from altering or editing the film or program in any fashion. Even where a license agreement is silent, it would likely be a violation of the copyright in the film to create a new captioned version without the express authority to do so. For these reasons, the “existing contracts” exemption should encompass all contracts except those which expressly grant the licensee the right to create a captioned version of the film or program.

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REPLY COMMENTS OF ENCORE MEDIA CORPORATION

Encore Media Corporation (“EMC”) submits its reply to the comments filed in response to the Commission’s Notice of Proposed Rulemaking, FCC 97-4, released January 17, 1997 (“NPRM”), in this proceeding. EMC is one of the largest providers of programming networks to multichannel video program distributors, including cable, DBS, wireless cable, TVRO, and SMATV operators. EMC recognizes the importance of serving consumers with hearing impairments, and filed Comments on February 28, 1997, in response to the NPRM setting forth its views requested by the Commission. In this reply, EMC seeks to respond to a limited number of issues raised in the comments of other interested parties.

I. Captioning Requirements for Newly-Produced Programming

Most commenters in this proceeding, including EMC, generally supported the Commission’s proposal that for programs “first published or exhibited after the effective date of the regulations,” mandatory captioning be phased in over a period of eight to ten years, with

25% required to be captioned by two to three years after the effective date, 50% by the end of four or five years, 75% by the end of six or eight years, and 100% by the end of eight or ten years. EMC had argued that in view of both the costs of captioning and the basic flaws in the Commission's proposed regime of imposing the burden of captioning on entities which do not own the programs, the ten year implementation schedule was more realistic and fair than the eight year schedule.

Only certain of the groups which represent the hearing impaired argued that the reasonable phase-in schedules proposed by the Commission were inadequate, and that closed captioning of newly-produced programming should be phased in over a much shorter period of three to four years. See Comments of the National Association of the Deaf ("NAD Comments") at p. 4; Comments of the League of the Hard of Hearing ("LHH Comments") at p. 3. Moreover, both the NAD and the LHH suggested that the Commission should require that the incremental percentage requirements of the phase-in period (i.e., 25%, 50%, 75%, 100%) each be "over and above the amount of captioning already provided on the effective date of the FCC's rules." NAD Comments at 5; LHH Comments at 3.

Notwithstanding NAD's and LHH's desires for an accelerated phase-in of captioning, the Commission's original proposal reflected a reasonable balancing of the needs of the hearing impaired against the monumental costs involved in the captioning of all newly produced programming. As reflected in the comments filed herein by the National Cable Television Association ("NCTA"), the captioning of all basic cable programming would cost hundreds of millions of dollars per year. The statute clearly requires that the costs of captioning must be

balanced against the benefits in the development of captioning requirements.¹ The Commission's proposed transition period of eight to ten years more appropriately reflects that necessary, statutory-required balancing.

Moreover, the NAD and LHH position that the incremental required percentages be "over and above" whatever any programmer is providing as of the effective date of the rules, is contrary to the specific proposal set forth by the Commission. Rather, the NPRM at paragraph 42 specifically proposes that "... at the end of two years after the effective date, 25% of new non-exempt new programming must be closed captioned" The NPRM is not the slightest bit "unclear" on this point, as NAD suggests. In addition, the NAD/LHH approach would be patently unfair to programmers, such as EMC, that are already doing a superior job of providing captioning over their channels as compared to those that are not.² Indeed, NAD/LHH's approach would essentially reward those programmers that have lagged behind in providing captioning. Moreover, as a practical matter, it is difficult to conceive how a 25% "over and above" standard would be evaluated. The phased-in standard being discussed here is for programs "first published or exhibited after the effective date of such regulations" How would a programmer evaluate the pre-existing percentage of captioned programs that were

¹ The Conference Report accompanying the statute directs the Commission to "establish reasonable timetables and exceptions for implementing this section. Such schedules should not be economically burdensome on program providers, distributors or the owners of such programs." H.R. Rep. No. 104-458, 104th Cong., 2d Sess. (1996) at 183.

² For example, EMC's STARZ!-encore 8 channel, which generally carries the most recently-produced programming of EMC's channels, provided closed captioning for approximately 43% of the program time during January 1997. It is noted that this percentage includes older library programs that would be subject to a separate standard under the Commission's proposed rules. Were we to exclude programming more than, say, a year old, the percentage of captioned programming for STARZ!-encore 8 would be significantly higher.

“first exhibited after the effective date” of the new rules? The NAD/LHH proposed “over and above” standard should be rejected as it is both unfair to those programmers that are ahead of the curve in delivering captioned programming to consumers, and practically impossible to evaluate in practice.

EMC does wish to restate its own proposal that at the end of the phase-in period, whether it is eight or ten years, captioning should be required for slightly less than 100% of the total programming first exhibited after the effective date. EMC had suggested in its Comments filed herein that the Commission adopt a rule which ultimately requires that, at the end of the phase-in period, only 97% of newly-produced programming be closed captioned. EMC notes that the NCTA similarly proposed that 90% be considered such substantial compliance, citing other Commission requirements where as low as 80% of a standard is considered “substantial compliance” (e.g., principal city coverage for FM stations). Such a slightly reduced level of “substantial compliance” would obviate the need for the Commission to devote limited staff resources to ruling on isolated waivers or exemptions. A slight “cushion” such as that proposed by EMC or by NCTA would be adequate to allow for an isolated program or movie that cannot be captioned due to a short period of time between its completion and its scheduled airing, or due to contractual or ownership problems, without requiring the Commission to become routinely involved in evaluating and ruling on waiver or exemption requests.

II. Captioning of Older Programming

The NPRM proposed that for older programming first exhibited prior to the effective date of the rules, there should ultimately be a requirement that 75% of such programming be closed captioned. However, the NPRM proposed neither a deadline nor phase-in period for this

requirement. EMC in its Comments stated that there should be no mandatory captioning of library programming. However, if such a requirement is imposed, there should not be any phase-in period or deadline for such requirement. In their comments, the groups representing the hearing impaired generally argued that all library programs should eventually be captioned, but recognized that a longer time period for full captioning might be appropriate as compared to newly-released programs. In addition, the groups representing the hearing impaired argued that a similar phase-in structure should also be imposed.

As EMC noted in its Comments, the amount of material that is actually captioned decreases dramatically the older the programming involved. Very few feature films released before 1985 were closed captioned by even the major film studios. While there remains substantial viewer interest in films released before 1985, especially among ardent feature film audiences, the cost of now captioning a previously uncaptioned film is certainly not automatically assumed or paid by the present copyright owner. Rather, such copyright owner or rights holder, which may not be the studio which originally produced the film, has typically been very reluctant to invest more money in the old film.

The reasons militating against a tight deadline and/or a phase-in period for library programming relate directly to the nature and structure of the film licensing marketplace. The duration of contracts between program networks such as EMC's and studios for library films is typically rather long, usually seven years, and these contracts do not allow for early termination on the basis that most of the movies are not captioned. Moreover, given the limited number of feature film distributors and the demand for film product, EMC could not afford to terminate large film package agreements and lose large blocks of film titles that are the

lifeblood of EMC's ten movie channels, even if EMC had such rights without breaching those contracts. Thus, the program networks such as EMC's channels have no bargaining power to require the studios to make that investment in old films prior to the expiration of the current licensing contracts, potentially several years down the road. Indeed, it will take seven or more years from now for many film license agreements currently in effect to expire. In other words, the programs on networks for the next seven years have largely already been bought, and the type of bargaining that the Commission and the groups representing the hearing impaired have envisioned, where a consumer video provider could simply either require the supplier to caption the program or "refuse to buy" it, does not exist under current contracts and is unlikely to exist under future contracts and business realities. It is for this reason in particular that there should be no mandatory captioning of library programming.

Moreover, even after the current contracts expire several years from now, the programming marketplace will likely remain essentially a seller's market, where there are many potential buyers for a limited number of higher quality films and programs. With the number of program networks growing, the bargaining power will likely become even more heavily weighted toward the studios and producers in the future. If a program network desires to provide consumers with the type of quality programming they require, it does not realistically or competitively have the option of refusing to buy high quality programming, even if the studios and producers refuse to caption them. Further, movie channels such as EMC's services must purchase large numbers of films to fill their schedules, and such films must typically be purchased in large packages of titles, often in the hundreds at a time, in order to obtain volume discounts from the studios. Under these circumstances, it is unduly burdensome on parties

without any ownership in the programming to be required to invest in captioning of such library programs. Even over time, the type of bargaining that would be necessary to implement captioning of library programming on a faster or phased-in basis, where an MVPD or broadcaster could simply either require the supplier to caption the program or “refuse to buy” it, will never take over the program licensing marketplace, and it is unrealistic to expect that this current marketplace system would be subject to change merely to conform to captioning requirements. Even if the Commission were to adopt an eventual requirement of captioning of 75% of library programming as proposed in the NPRM, such a requirement should not be imposed before fifteen years from the effective date of the new rules. Moreover, a rigid phase-in schedule as is proposed for newly-produced programming would be inappropriate for library programming, particularly in view of the long-term contracts that will not free up parties to buy or not buy individual programs or films based on captioning for several years to come.

III. Exemptions for Types of Programming

The NPRM considered whether certain types of programming ought to be exempt from required captioning. EMC supports the establishment of limited exemptions for two types of programming in particular: (i) short-form promotional programming or interstitials; and (ii) instructional educational programming for children.

A. Interstitial Program Segments

The NPRM proposed at paragraph 79 that promotional and scheduling announcement interstitials be exempt from the captioning requirements for the reasons that most interstitials have little or no lasting value, that such interstitials often provide the basic information in

textual form, and that large numbers of such segments must be produced in short time periods. Thus, the Commission tentatively concluded that the burden of requiring captioning of such segments outweighs the benefit of a mandatory requirement for captioning them. EMC's Comments supported this proposed exemption for the reasons stated by the Commission.

EMC's movie channels and other movie-oriented networks regularly use a variety of newly-produced promotional segments in between the films, which themselves are shown without interruption. As suggested by the Commission, these short promotional segments are often accompanied by material appearing in textual form on the screen. Usually these promotional segments focus on daily scheduling, publicity about programming to appear on the channel, or other material of little or no lasting value. These interstitials have only marginal value to viewers and are not the basis on which viewers subscribe to the program service. Additionally, many of these interstitials are produced live or just shortly before airing on the network. It would be cost prohibitive for EMC to caption the large number of such interstitials it airs on its multiple channels each day. For this reason, EMC urges the Commission to adopt a simple rule that exempts all interstitials, including scheduling announcements, program introductions, and short-form promotional segments.

Should the Commission determine that such an exemption for all interstitials is too broad, EMC suggests, in the alternative, that the Commission consider the specific proposal set forth in the separate Comments of the Motion Picture Association of America, Inc. ("MPAA"), and of Home Box Office ("HBO") that, for ease of administration, the Commission should adopt a rule that all material of fifteen minutes' duration or less should be exempt from the captioning requirements. MPAA and HBO reason that such an approach would relieve the

Commission of the need to develop intricate rules that seek to define which type of interstitial should be exempt and which should not, based on content or type or some other subjective standard as has been suggested by some parties, by allowing the Commission to exempt all interstitials and short-form programming based on the duration under this specified amount. Those parties note, and we agree, that such a simple, bright-line, time-based rule would eliminate any significant demand on the Commission's staff to evaluate or rule on specific interstitials for compliance with the rules or for individual waivers or exemptions. A fifteen minute or less standard is appropriate for this exemption because short-form programs and interstitials of such duration can be assumed not to be of an enduring, resalable nature, so that captioning costs cannot be expected to be recouped through multiple showings, given the industry standard of 30-minute programs as the minimum for entertainment programming (or 22 minutes minus the ads). Therefore, if the Commission does not create a blanket exemption for all interstitials, the Commission should at the minimum exempt all programming and interstitials of fifteen minutes duration or less.

B. Instructional Educational Programming

With respect to instructional educational programming for children, EMC's Comments in this docket noted that its children's programming channel, WAM!America's Kidz Network, is a completely commercial-free youth-oriented educational/entertainment network which devotes a substantial portion of its schedule -- approximately 12 hours each day -- to classroom-style instructional programming. This programming is produced on minimal budgets by institutions and other producers and presented by WAM! as a public service to its subscribers. The cost of captioning such programming in most cases would be prohibitive for the producing

institutions, as the cost of closed captioning such programs would actually exceed the license fees paid by EMC to the producers. EMC could not realistically pay for the closed captioning as that would increase the license fees by more than 100% in most cases.³ Requiring producers or the network to incur the cost of captioning will directly result in substantially less such programming being produced and aired. Therefore, such programming as a rule should be exempt from the captioning requirements.

EMC submits that the focus for increasing the amount of captioning of instructional classroom programs should not rest with forcing the channels which air them (almost always as a public service without financial gain as in EMC's case), but rather in seeking continued or increased governmental or foundation funding of captioning efforts for these programs. This is an instance where the marketplace unfortunately essentially fails, and where the government or charitable foundations must move in to satisfy a societal need. Should captioning of instructional programming merely be required of programmers, then unquestionably, less such programming will be aired, because, as noted above, captioning easily and often costs more than the license fees, if any, that the programmers pay to obtain this programming. Where instructional programming aired on EMC's WAM! is captioned, it is almost always because a governmental or foundation grant has been obtained to defray the costs of the captioning. Otherwise, the economics of producing and airing noncommercial instructional programming simply do not support its captioning.

³ EMC notes that in some instances, captioning has been provided for its educational programming where government grants have been obtained to defray the cost.

IV. Exemptions for “Existing Contracts”

Section 712(d)(2) of the Telecommunications Act of 1996 exempts video programming providers or owners from the captioning requirements “if such captions would be inconsistent with contracts in effect on the date of enactment of the Telecommunications Act of 1996” EMC demonstrated in its Comments that the NPRM’s tentative conclusion at paragraph 87, that only “contracts which affirmatively prohibit closed captioning would fall within this exemption,” fails to consider the actual nature and terms of existing programming contracts. Specifically, nearly all program/network licensing agreements and network/MVPD affiliation agreements only grant to the licensees very limited exhibition rights, and specifically reserve to the copyright owner or distributor all rights not affirmatively granted in the limited license agreement. Other contracts may not expressly prohibit the licensee from creating a new captioned version of the film, but do expressly prohibit the licensee from editing or altering the film in any way. Such a broad prohibition against making any alteration to a copyrighted work would likely be read by the licensor to prohibit the licensee, such as EMC, from creating a captioned version of the work. Moreover, even where EMC is granted a limited right to edit or where the contract is silent, the right to create a closed captioned version of a film (i.e., a derivative work) is not typically implied in studio contracts. Hence, even the presence of an editing right (which tends to be extremely limited when granted) does not imply a right to create derivative works.

As set forth previously, most of EMC’s program contracts include broad prohibitions against EMC making any changes, modifications, or additions to the films covered by the contracts. For example, one of EMC’s major film library agreements states that “Licensee shall

not have the right to edit, alter (including but not limited to Exhibiting only a portion of a Licensed Film), time compress or expand any of the Licensed Films or any portion thereof.” Another of EMC’s major film library agreements similarly provides EMC with limited exhibition rights in the subject films, and then includes the following broad reservation of rights to the studio: “All licenses, rights and interest in, to and with respect to the Licensed Pictures, elements and parts thereof, and media of transmission not specifically granted herein to Licensee shall be, and are specifically and entirely reserved to [the studio]” Further, this agreement provides that “. . . neither Licensee nor any Affiliated System shall cut, edit, change, add to, delete from or revise any Licensed Picture”⁴ The studios are characteristically vigilant in enforcing the rights limitations in their agreements, and the provisions of these agreements could reasonably be read as prohibiting the creation of a new captioned version of the works covered by such contracts by the licensee, EMC. The rights to films exhibited by EMC’s networks are its most important properties; EMC cannot risk a default incurred by a violation of such provisions.

EMC thus submits that the Commission’s proposed interpretation of this statutory exemption is much too narrow, and that the types of contracts described previously in its Comments which either (i) grant limited exhibition rights and then reserve to the studio all rights not granted to the studio, or (ii) expressly prohibit a licensee from “editing or altering” a licensed film, should also come within the “inconsistent with current contracts” statutory exemption. Moreover, even where a program contract is silent as to the right of a licensee to

⁴ Due to the confidentiality provisions which uniformly appear in all such film licensing agreements, EMC cannot provide copies of the licensing agreements.

caption a copyrighted film, it may be a violation of that copyright for the limited licensee to create a captioned version of that film. Under industry practice, a closed captioned film is considered to be a separate version of a film (similar to separate versions such as the airline, broadcast, or Spanish language versions). It is typically understood in the industry that a licensee is only entitled to versions for which it has received a specific grant. Therefore, even editing or alteration rights would not necessarily give a licensee such as EMC the right to create and/or exhibit an unauthorized version of the film.

For these reasons, the “existing contract” exemption should include any program whose contract does not expressly and affirmatively include the right of the licensee to create a captioned version. Indeed the language used in the statute that such pre-existing agreements merely be “inconsistent” with the captioning requirements to qualify for an exemption suggests a much broader exemption than the strict “expressly prohibit captioning” standard suggested in the NPRM.

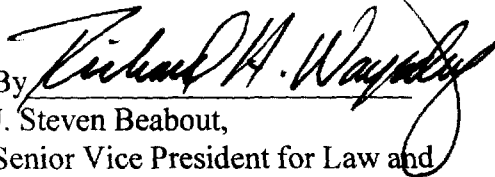
V. Conclusion

As set forth in its Comments previously filed in this docket, EMC, like most other program network providers, has dramatically increased the amount of captioned programming it airs. Certainly over the next decade, the great majority of feature films EMC’s channels air, whether first exhibited before or after the new captioning rules’ effective date, will be closed captioned for the hearing impaired. Nonetheless, the captioning requirements must take into account the fact that neither the MVPDs themselves nor the networks that supply them with programming actually own that programming. The networks and in turn the MVPDs often do

not have rights to caption that programming themselves. Moreover, the costs of captioning in many cases would be prohibitive to the networks' ability to continue to provide high quality programming to MVPDs and ultimately to subscribers at consumer-friendly rates. Additionally, such programming rights and program services are often licensed under long term agreements that will not expire for several years to come. Thus the rules adopted by the Commission must provide the parties with flexible time schedules for implementation of captioning obligations.

Respectfully submitted,

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